

United States
Circuit Court of Appeals
For the Ninth Circuit.

F. M. WITHERS and C. H. WITHERS, Copartners Doing Business Under the Firm Name and Style of WITHERS BROS.,
Appellants,

vs.

A. H. JOHNS, as Trustee in Bankruptcy of E. Y. FOLEY, INC., a Bankrupt, and Also as Trustee in Bankruptcy of E. Y. FOLEY, a Bankrupt, and PACIFIC SOUTHWEST TRUST & SAVINGS BANK, a Corporation, et al.,
Appellees.

Transcript of Record.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION.

FILED

FEB 10 1923

F. D. MONKTON,
CLERK.

United States
Circuit Court of Appeals
For the Ninth Circuit.

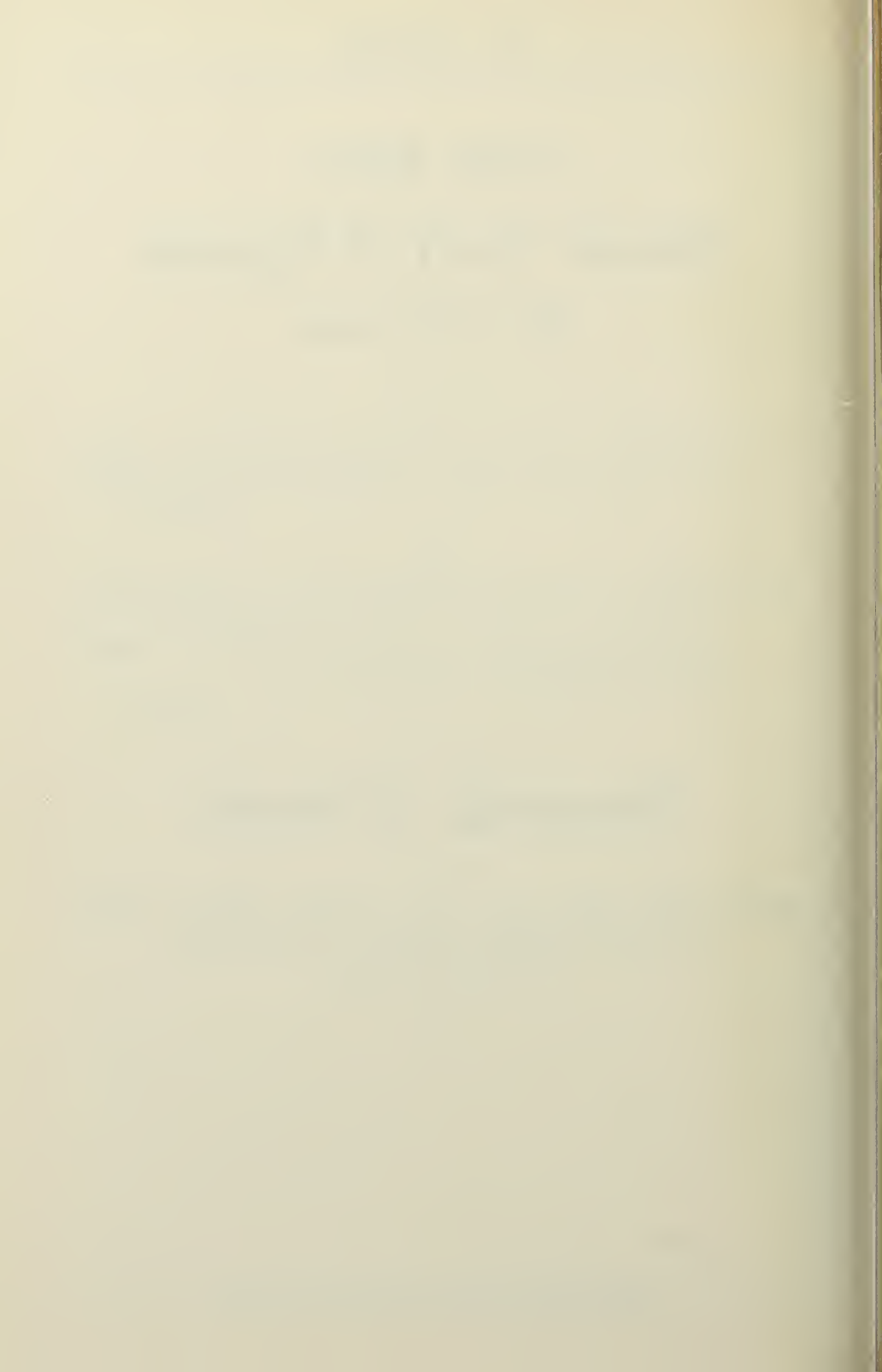
F. M. WITHERS and C. H. WITHERS, Copartners Doing Business Under the Firm Name and Style of WITHERS BROS.,
Appellants,

vs.

A. H. JOHNS, as Trustee in Bankruptcy of E. Y. FOLEY, INC., a Bankrupt, and Also as Trustee in Bankruptcy of E. Y. FOLEY, a Bankrupt, and PACIFIC SOUTHWEST TRUST & SAVINGS BANK, a Corporation, et al.,
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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD.

For Petitioner:

I. HENRY HARRIS, Esq., 431 Title Insurance Building, Los Angeles, California.

For Respondents:

THEODORE M. STUART, Esq., Fresno, California, for the Trustee.

MILTON DEARING, Esq., and LEONARD SLOSSON, Esq., Fresno, California, for the Pacific Southwest Trust & Savings Bank.

In the District Court of the United States in and for the Southern District of California, Southern Division.

No. B.-121-M.—EQUITY.

A. H. JOHNS, as Trustee in Bankruptcy of E. Y. FOLEY, Inc., a Bankrupt, and also as Trustee in Bankruptcy of E. Y. FOLEY, a Bankrupt,

Plaintiff,

vs.

PACIFIC SOUTHWEST TRUST AND SAVINGS BANK, a Corporation, et al.,
Defendants;

F. M. WITHERS and C. H. WITHERS, Petitioners and Appellants.

CITATION ON APPEAL.

United States of America,—ss.

To A. H. Johns as Trustee in Bankruptcy of E. Y. Foley, Inc., a Bankrupt, and also as Trustee in Bankruptcy of E. Y. Foley, a Bankrupt, Pacific Southwest Trust and Savings Bank, a Corporation, et al., GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, in the State of California on the 3d day of January, 1928, pursuant to an order allowing appeal filed and entered in the Clerk's office of the District Court of the United States in and for the Southern District of California, Southern Division, from an order, signed, filed and entered on the 9th day of November, 1927, in that certain suit, being in Equity No. B.-121—M. wherein A. H. Johns as Trustee in Bankruptcy of E. Y. Foley, Inc., a bankrupt, and also as Trustee in Bankruptcy of E. Y. Foley, a bankrupt, is plaintiff, and Pacific Southwest Trust and Savings Bank, a corporation, et al., are the defendants, and wherein F. M. Withers and C. H. Withers, doing business under the firm name and style of Withers Bros., are petitioners and appellants, for leave to intervene, to show cause, if any there be, why the order denying petitioners and appellants the right to intervene, as mentioned in said order, should not

be corrected, and why justice should not be done the parties in that behalf.

WITNESS the Hon. PAUL J. McCORMICK, United States District Judge for the Southern District of California, this 3d day of December, 1927, and of the Independence of the United States, the one hundred and fifty-first.

[Seal] PAUL J. McCORMICK,
United States District Judge for the Southern District of California, Southern Division.

Dec. 3, 1927.

R. S. ZIMMERMAN,
Clerk U. S. District Court, Southern District of California.

By Louis J. Somers,
Deputy Clerk.

[Endorsed]: Filed Dec. 3, 1927.

MANDATE OF UNITED STATES CIRCUIT
COURT OF APPEALS, NINTH CIRCUIT.

UNITED STATES OF AMERICA,—SS.

The President of the United States of America, to
the Honorable the Judges of the District
(Seal) Court of the United States for the Southern District of California, Northern Division, GREETING:

WHEREAS, lately in the District Court of the United States for the Southern District of California, Northern Division, before you, or some of you,

in a cause between William E. White, as Trustee in Bankruptcy of E. Y. Foley, Inc., a bankrupt, and also as Trustee in Bankruptcy of E. Y. Foley, a bankrupt, plaintiff, and Pacific Southwest Trust and Savings Bank, a corporation, John Doe and Richard Roe, defendants, No. B.-121—M, in Equity, a decree was duly filed and entered on the 16th day of February, A. D. 1926, which said decree is of record and fully set out in said cause in the office of the Clerk of the said District Court, to which record reference is hereby made and the same is hereby expressly made a part hereof, and as by the inspection of the Transcript of the Record of the said District Court, which was brought into the United States Circuit Court of Appeals for the Ninth Circuit by virtue of appeals prosecuted by A. G. Johns, as Trustee in Bankruptcy, etc., as appellant, against Pacific-Southwest Trust & Savings Bank, a corporation, and J. E. Lynes, Individually and as Trustee, etc., as appellees, and by Pacific-Southwest Trust & Savings Bank, a corporation, as appellant, against A. G. Johns, as Trustee in Bankruptcy, etc., Arthur Bainbridge Tarpey, as Executor of the Last Will, etc., C. D. Pruner and J. E. Lynes, Individually and as Trustee, etc., as appellees, and by J. E. Lynes, Individually and as Trustee, etc., as appellant, against A. G. Johns, as Trustee in Bankruptcy, etc., Pacific-Southwest Trust & Savings Bank, a corporation, Arthur Bainbridge Tarpey, as Executor of the Last Will, etc., and C. D. Pruner, as appellees, agreeably to the

Act of Congress in such cases made and provided, fully and at large appears:

AND WHEREAS, on the 12th day of October, in the year of our Lord one thousand nine hundred and twenty-six, the said cause came on to be heard before the said Circuit Court of Appeals, on the said transcript of the record, and was duly argued and submitted:

ON CONSIDERATION WHEREOF, it is now here ORDERED, ADJUDGED AND DECREED by this Court, that that portion of the decree of the said District Court in this cause disposing of the moneys in the Special "A" account be, and hereby is, affirmed, and that as to other issues, the said decree be, and hereby is, reversed, and that this cause be, and hereby is, remanded to the said District Court for further proceedings in accordance with the opinion of this court, with costs in favor of Pacific-Southwest Trust & Savings Bank et al., and J. E. Lynes, etc., et al., and against A. G. Johns, as Trustee, etc.

It is further ORDERED, ADJUDGED AND DECREED by this Court, that the said Bank et al. and Lynes et al. recover against the Johns, as Trustee, for their costs herein expended, and have execution therefor.

(November 1, 1926.)

YOU, THEREFORE, ARE HEREBY COMMANDED, That such execution and further proceedings be had in the said cause in accordance

with the opinion and decree of this court, and as according to right and justice and the laws of the United States ought to be had.

WITNESS, the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, the eighth day of March, in the year of our Lord one thousand nine hundred and twenty-seven.

[Endorsed]: No. 4882. United States Circuit Court of Appeals for the Ninth Circuit. A. G. Johns, as Trustee, etc., vs. Pacific-Southwest Trust & Savings Bank et al. Mandate.

[Endorsed]: B.-121.-M.—Eq. In the District Court of the United States, Southern District of California, Northern Division. Wm. E. White, as Trustee in Bkcy., v. Pacific Southwest Trust & Savings Bank. Mandate of Circuit Court of Appeals, Ninth Circuit. Filed April 28, 1927. R. S. Zimmerman, Clerk. By Louis J. Somers, Deputy.

In the District Court of the United States, for the
Southern District of California, Northern
Division.

No. B.-121-M.—EQUITY.

WILLIAM E. WHITE, as Trustee in Bankruptcy
of E. Y. FOLEY, INC., a Bankrupt, and
also as Trustee in Bankruptcy of E. Y.
FOLEY, a Bankrupt,

Plaintiff,

vs.

PACIFIC SOUTHWEST TRUST AND SAV-
INGS BANK, a Corporation, et al.,

Defendants;

and

F. H. WILSON,

Plaintiff in Intervention.

COMPLAINT IN INTERVENTION OF F. H.
WILSON.

Comes now F. H. Wilson, who as plaintiff in in-
tervention, leave of Court being first had and ob-
tained, files this his complaint in intervention, and
alleges:

1.

That A. G. Johns has *succeeded* plaintiff William
E. White as Trustee in Bankruptcy as aforesaid,
and is now the party in interest as plaintiff herein
in such representative capacity.

2.

The defendants, Pacific Southwest Trust and Savings Bank, a corporation, hereinafter called the Pacific Bank, J. E. Lynes, both individually and as Trustee for A. Arena & Co., Andrews Bros., A. Cancelmo, *Sweeny* Lynes & Co., Galinsy Fruit Co., F. E. Nellis & Co. and Penn Macaroni Co., and A. G. Johns, as such Trustee, by the joining of their issues herein, severally claim and assert an interest, adverse to F. H. Wilson, said plaintiff in intervention, in the certain fund hereinafter called "Special Account A," and an adjudication of the rights of the plaintiff and several defendants above named, without regard to the interest of said F. H. Wilson in and to said "Special Account A" would necessarily deprive said F. H. Wilson of a definite interest therein and or *causr* and provoke a multiplicity of suits by said F. H. Wilson against the several parties who may otherwise be adjudged to be entitled to said fund.

3.

That F. H. Wilson is now and was on the date thereof, and ever since has been the payee and owner of a certain Check, No. 3441, dated August 15th, 1923, for the sum of \$1,169.10 drawn upon said fund, to wit: E. Y. Foley, Inc., Special Account "A" signed and countersigned E. Y. Foley, Inc., by E. Y. Foley and H. A. Lyddane, thereunto duly authorized, and as such owner became the equitable assignee of a portion of such fund, to wit: the sum of \$1,169.10 thereof, same being 25 per cent

of the amount of the then indebtedness of E. Y. Foley to said payee.

4.

That said check was duly presented to said Pacific Bank for payment in due course, out of said fund, and said Bank wrongfully refused and/or withheld payment thereof, but thereupon took, kept, and now has possession of said check for the use of said F. H. Wilson, and the same is yet wholly unpaid.

5.

That the said fund "Special Account A" was and is a fund created and deposited with the said Pacific Bank for the purpose of paying to said F. H. Wilson, George Rice, A. Setrakian, Gentile & Marco, and other creditors, 25 per cent of the then indebtedness of E. Y. Foley to them the said F. H. Wilson and such other creditors, as more fully appears from the findings and judgment herein, which judgment was duly entered herein on February 16th, 1926, and which as to the character of said fund has not been modified.

6.

That all the said claims of the plaintiff and of the several defendants herein named were at all times herein mentioned and are now subordinate and subject to the right of the said F. H. Wilson to have and recover said sum of \$1,169.10 from and of the money in said fund, of which fund the sum of \$57,988.41 or thereabout is now and at all times herein mentioned was on deposit with and in the said Pacific Bank.

7.

That the status of the plaintiff and the defendants herein named, and of the said F. H. Wilson, A. Setrakian, Geo. Rice, Gentile & Marco, and other creditors of the said E. Y. Foley and E. Y. Foley, Inc., with respect to their interest in the said "Special Account A," has been in litigation for three years and more last past and until the refusal of the Supreme Court of the United States to review the decree of the United States Circuit Court to which the judgment of this Court was referred upon appeal, the plaintiff in intervention could not, by reason of such controversy, determine what legal and /or equitable course to pursue in order to avoid a multiplicity of actions and/or protect his interests and/or claims upon and against said fund and/or the plaintiff and defendants.

8.

That the issues involved in this action, with relation to the said "Special Account A," cannot be properly and equitably determined without reference to and determination of the rights and interest of the said F. H. Wilson therein, and he is therefore a necessary and/or proper party to this action.

For and as a further and second cause of intervention, said F. H. Wilson alleges:

9.

That all the allegations set forth in paragraphs 1, 2, 5, 7, and 8 of this complaint in intervention are true, are re-alleged herein by reference, and are made a part hereof as if set forth in full.

10.

That on the date thereof, said Geo. Rice was the payee and owner of a certain check, No. 3790, dated Aug. 15th, 1923, for the sum of \$329.02 and was then also the payee and owner of a certain check, No. 3397, dated Aug. 15th, 1923, for the sum of \$226.29, both drawn upon the said fund, to wit: E. Y. Foley, Inc., Special Account "A," signed and countersigned by E. Y. Foley, Inc., by E. Y. Foley and H. A. Lyddane, thereunto duly authorized, and as such owner became the equitable assignee of a portion of such fund, to wit: \$555.31, same being 25 per cent of the amount of the then indebtedness of said E. Y. Foley to said payee.

11.

That both of said checks were presented to said Pacific Bank for payment in due course out of said fund, and the said Bank wrongfully refused and/or withheld payment of both of said checks, and still withholds and/or refuses such payment and the said checks are yet wholly unpaid.

12.

That immediately prior to the filing of this complaint in intervention, said Geo. Rice transferred and assigned the said checks to said F. H. Wilson with the purpose and intent that and the fact is that said F. H. Wilson thereby became and is now the owner and holder of said checks.

13.

That all the claims of the plaintiff and of the several defendants herein named were at all times

herein mentioned and are now subordinate and subject to the right of the said F. H. Wilson and his assignors to have and recover said sum of \$555.31 from and of the money in said fund, of which the sum of \$57,988.41 or thereabout is now and at all times herein mentioned was on deposit with and in the said Pacific Bank.

For and as a further and third cause of intervention, said F. H. Wilson alleges:

14.

That all the allegations set forth in paragraphs 1, 2, 5, 7, and 8 of this complaint in intervention are true, are re-alleged herein by reference, and are made a part hereof as if set forth in full.

15.

That on the date thereof, said Gentile and Marco was the payee and owner of a certain check, No. 3781, dated August 15th, 1923, for the sum of \$6,875 drawn upon the said fund, to wit: E. Y. Foley, Inc., Special Account "A," duly signed and countersigned by E. Y. Foley, Inc., by E. Y. Foley and H. A. Lyddane, thereunto duly authorized, and as such owner became the equitable assignee of a portion of such fund, to wit: the sum of \$6,875, same being 25 per cent of the then indebtedness of said E. Y. Foley to said payee.

16.

That said check was duly presented for payment in due course out of said fund, and the said Bank wrongfully refused and/or withheld payment

thereof, and still withholds and/or refuses such payment and the said check is yet wholly unpaid.

17.

That immediately prior to the filing of this complaint in intervention, the said check was duly and regularly assigned and transferred to said F. H. Wilson, with the purpose and intent that, and the fact is that said F. H. Wilson thereby became and is now the owner and holder of said check.

18.

That all the claims of the plaintiff and of the several defendants herein named were at all the times herein mentioned and are now subordinate and subject to the right of the said F. H. Wilson and his assignors to have and recover the said sum of \$6,875 from and of the said money in said fund, of which the sum of \$57,988.41 or thereabout is now and at all times herein mentioned was on deposit with and in the said Pacific Bank.

WHEREFORE said F. H. Wilson, the plaintiff in intervention prays that he may be permitted to prove his said checks and his claims as aforesaid, and that upon modification of the judgment herein, he be duly awarded the amounts of the several checks, hereinbefore described, aggregating the sum of \$8,599.41 and

That such judgment when modified do order and direct that from the said "Special Account A" the said F. H. Wilson be paid the said sum of \$8,599.41 on account of such checks, and

That the Court do make such other and further order herein as shall by it be deemed necessary to effect settlement, of the claims of the said plaintiff in intervention.

F. H. WILSON,
Plaintiff in Intervention.
By LeROY G. SMITH,
Attorney for Plaintiff in Intervention.

State of California,
County of Tulare,—ss.

F. H. Wilson, being first duly sworn, deposes and says: That he is the plaintiff in intervention named in the above-named entitled action, and matter, that he has read the foregoing complaint, knows the contents thereof, and the same is true of his own knowledge, except to matters therein stated on information and belief, and as to those matters he believes it to be true.

F. H. WILSON.

Subscribed and sworn to before me this 4th day of May, 1927.

[Seal]

LeROY G. SMITH,
Notary Public.

[Endorsed]: Filed May 6, 1927.

[Title of Court and Cause.]

NOTICE OF MOTION FOR LEAVE TO
INTERVENE (SECOND).

To Theodore M. Stuart, Esq., Attorney for Plaintiff Milton M. Deering, Esq., Robert M. Thomas, Esq., Farrand & Slosson, Esq., Attorneys for Pacific Southwest Trust & Savings Bank,

Ward Chapman, Esq., Attorney for J. E. Lynes, and Harris & Hayhurst, Esqs., Attorneys for C. D. Pruner and M. F. Tarpey, Defendants:

You, and all of you, will please take notice that, on the 13th day of June, 1927, at ten o'clock A. M., or as soon thereafter as counsel can be heard, at the courtroom of said Court, in Los Angeles, State of California, at the Federal Building, F. H. Wilson will move the Court for permission to file his proposed second complaint in intervention in said cause, a copy of which is attached hereto and served with this notice, and for leave to be heard in support of the same.

Said motion will be made on the grounds that said F. H. Wilson is a necessary and/or proper party to said action; that a proper and complete disposal of the issues involved therein cannot be had nor adjudged without reference to the rights of the said F. H. Wilson and his interests in the subject matter of the said action; that he has an interest in the subject matter of said action, which,

unless determined in this action would, and will provoke and result in a multiplicity of suits against the prevailing parties herein; all of which more fully appears from the said verified complaint in intervention so offered for filing, and served herewith, and

Said motion will be based upon the files, papers, findings, judgments and exhibits on file in said case, and upon the facts stated in said complaint in intervention.

LeROY G. SMITH,

LeROY G. SMITH,

Attorney for F. H. Wilson, Plaintiff in Intervention.

[Endorsed]: Filed Jun. 7, 1927.

[Title of Court and Cause.]

NOTICE OF MOTION FOR LEAVE TO
INTERVENE.

To Theodore M. Stuart, Esq., Attorney for Plaintiff, Milton M. Deering, Esq., Robert M. Thomas, Esq., Farrand & Slosson, Esqs., Attorneys for Pacific Southwest Trust and Savings Bank,

Ward Chapman, Esq., Attorney for J. E. Lynes, and Harris & Hayhurst, Esqs., Attorneys for C. D. Pruner and M. F. Tarpey, Defendants:

You, and each of you, will please take notice that, on the 11 day of July, 1927, at ten o'clock

A. M., or as soon thereafter as Counsel can be heard, at the courtroom of said Court, in Los Angeles, state of California, at the Federal Building, F. M. Withers and C. H. Withers will move the Court for permission to file their proposed complaint in intervention in said cause, a copy of which is attached hereto and served with this notice, and for leave to be heard in support of the same.

Said motion will be made on the grounds that F. M. Withers and C. H. Withers are necessary and/or proper parties to said action; that a proper and complete disposal of the issues involved therein cannot be had nor adjudged without reference to rights of the said F. M. Withers and C. H. Withers, and their interests in the subject matter of said action; that they have an interest in the subject matter of said action, which, unless determined in this action, would and will provoke and result in a multiplicity of suits against the prevailing parties herein; all of which more fully appears from the said verified complaint in intervention so offered for filing, and served herewith, and

Said motion will be based upon the files, papers, findings, judgments and exhibits on file in said case, and upon the facts stated in said complaint in intervention.

I. HENRY HARRIS,
Attorney for F. M. Withers and C. H. Withers,
Plaintiffs in Intervention.

[Endorsed]: Filed Jun. 29, 1927.

[Title of Court and Cause.]

COMPLAINT IN INTERVENTION OF F. M.
WITHERS AND C. H. WITHERS, COM-
POSING THE COPARTNERSHIP OF
WITHERS BROS.

Comes now F. M. Withers and C. H. Withers, who as plaintiffs in intervention, leave of Court being first had and obtained, files this their complaint in intervention, and alleges:

I.

That at all the times herein mentioned the plaintiffs in intervention were copartners, in business under the firm name and style of Withers Bros.

II.

That A. G. Johns has succeeded plaintiff, William E. White, as Trustee in Bankruptcy aforesaid, and is now the party in interest as plaintiff herein in such representative capacity.

III.

The defendants, Pacific Southwest Trust and Savings Bank, a corporation, hereinafter called the Pacific Bank, J. E. Lynes, both individually and as Trustee for A. Arena & Co., Andrews Bros., A. Cancelmo, Sweeney Lynes & Co., Galinsy Fruit Co., F. E. Nellis & Co., and Penn Macaroni Co., and A. G. Johns, as such Trustee, by the joining of their issues herein, severally claim and assert an interest, adverse to F. M. Withers and C. H. Withers, composing the copartnership of Withers

Bros., said plaintiffs in intervention, in the certain fund hereinafter called "Special Account A," and an adjudication of the rights of the plaintiff and several defendants above named, without regard to the interest of said F. M. Withers and C. H. Withers, composing the copartnership of Withers Bros., in and to said "Special Account A" would necessarily deprive said F. M. Withers and C. H. Withers, composing the copartnership of Withers Bros., of a definite interest herein and/or cause and provoke a multiplicity of suits by said F. M. Withers and C. H. Withers, composing the copartnership of Withers Bros., against the several parties who may otherwise be adjudged to be entitled to said fund.

IV.

On the 13th day of September, 1923, in the Superior Court of the State of California, in and for the County of Fresno, the plaintiffs in intervention recovered a judgment against E. Y. Foley, for the sum of \$27,283.40, which judgment is #29900, and on the 19th day of May, 1923, the said plaintiffs in intervention recovered a judgment in the Superior Court of the State of California, in and for the County of Fresno, against E. Y. Foley, for the sum of \$10,440.15, which judgment is #30471.

V.

That thereafter and on or about the 3d day of August, 1923, the said plaintiffs in intervention entered into an agreement with E. Y. Foley, Inc.,

wherein and whereby the said E. Y. Foley, Inc., agreed to pay to the plaintiffs in intervention the sum of twenty-one thousand five hundred (\$21,500) dollars, out of the E. Y. Foley, Inc., "Special Account A," on the 3d day of September, 1923, upon the ground that the judgments hereinbefore referred to were pressing debts of said Foley, the **payment** of which could not be deferred and that the balance of said judgments, as well as all other obligations, of every kind and nature, in favor of said F. M. Withers and C. H. Withers, or their assigns, and against E. Y. Foley, should be satisfied and discharged by the delivery or agreement to deliver unto the holder of said judgment or obligations, preferred stock of E. Y. Foley, Inc., to the amount of said balance, and upon the further condition that the plaintiffs in intervention satisfied said judgments to the extent of twenty-one thousand five hundred (\$21,500) dollars forthwith and satisfied the balance of the judgments when the preferred stock of the said E. Y. Foley, Inc., was delivered.

VI.

That the plaintiffs in intervention were at all times ready, willing and able to carry out the terms and conditions on their part to be performed.

VII.

That on or about the 3d day of August, 1923, the Board of Directors of the E. Y. Foley, Inc., passed a resolution, wherein the said corporation guaranteed to pay to the extent of \$21,500, the principal amount of the said two judgments, and

that the President and Secretary of the corporation were empowered to make, execute and deliver, on behalf of the corporation, all instruments necessary or required in their judgments to fully carry out said resolution.

VIII.

That pursuant thereto, the said corporation, on or about the 3d day of August, 1923, executed its promissory note for the sum of \$21,500, to the order of the plaintiffs in intervention, payable on September 3, 1923; that said note was presented for payment at maturity, payment thereon demanded, which was refused, although "Special Account A" at that time had sufficient funds with which to pay said note.

IX.

That F. M. Withers and C. H. Withers, composing the copartnership of Withers Bros., now are and were on the date thereof and ever since have been the payee and owner of said note, dated August 3, 1923, for the sum of \$21,500, payable out of E. Y. Foley, Inc., "Special Account A," which note was signed and countersigned by E. Y. Foley, Inc., E. Y. Foley, President, and H. A. Lyddane, thereunto duly authorized, and as such owner became the equitable assignee of a portion of such fund, to wit: the sum of \$21,500 thereof, with interest from the 3d day of September, 1923, as provided under the Exhibit "B," etc., being a pressing debt of said E. Y. Foley, that could not be deferred.

X.

That said note was duly presented to the said E. Y. Foley, Inc., and to the said Pacific Bank for payment, in due course out of said funds, and said E. Y. Foley, Inc., and said Pacific Bank wrongfully refused and/or withheld payment thereof; *that thereupon* took, kept and now has possession of said money for the use of the said Withers Bros., and the said note is wholly unpaid.

XI.

That the said fund "Special Account A" was and is a fund created and deposited with the said Pacific Bank for the purpose of paying to said Withers Bros., George Rice, A. Setrakian, Gentile & Marco, and other creditors, a part or a whole of the then indebtedness of E. Y. Foley to them the said Withers Bros. and such other creditors as more fully appears from the findings and judgment herein, which judgment was duly entered herein on February 16, 1926, and which as to the character of said fund has not been modified.

XII.

That all the said claims of the plaintiff and of the several defendants herein named were at all times herein mentioned and are now subordinate and subject to the right of the said F. M. Withers and C. H. Withers to have and recover the sum of \$21,500 from the money in said fund, of which fund the sum of \$57,988.411 or thereabouts is now and at all times herein mentioned was on deposit with the said Pacific Trust and Savings Bank.

XIII.

That the status of the plaintiff and the defendants herein named, and of the said F. M. Withers and C. H. Withers, A. Setrakian, Geo. Rice, Gentile & Marco, and other creditors of the said E. Y. Foley and E. Y. Foley, Inc., with respect to their interest in the said "Special Account A," has been in litigation for three years and more last past and until the refusal of the Supreme Court of the United States to review the decree of the United States Circuit Court to which the judgment of this Court was referred upon appeal, the plaintiffs in intervention could not, by reason of such controversy, determine what legal and/or equitable course to pursue in order to avoid a multiplicity of actions and/or protect their interests and/or claims upon and against said fund and/or the plaintiff and defendants.

XIV.

That the issues involved in this action, with relation to the said "Special Account A," cannot be properly and equitably determined without reference to and determination of the rights and interests of the said F. M. Withers and C. H. Withers therein, and he is therefore a necessary and/or proper party to this action.

XV.

That said claim has been filed herein with the Referee and has been allowed.

WHEREFORE, the said F. M. Withers and C. H. Withers, doing business under the firm name

and style of Withers Bros., the plaintiffs in intervention, pray that they may be permitted to prove their said notes and their claims as aforesaid, and that upon modification of the judgment herein they be duly awarded the amounts of said note hereinbefore described, amounting to the sum of \$21,500 and interest, and that said judgment when modified do order and direct that from the "Special Account A" the said F. M. Withers and C. H. Withers, doing business under the firm name and style of Withers Bros., be paid the said sum of \$21,500 on account of such note, and that the Court do make such other and further order herein as shall by it be deemed necessary to effect settlement of the claims of the said plaintiffs in intervention.

F. M. WITHERS and C. H. WITHERS,
Composing Copartnership of WITHERS
BROS.,

Plaintiffs in Intervention.

By I. HENRY HARRIS,

Attorney for Plaintiffs in Intervention.

State of California,

County of *California*,—ss.

F. M. Withers, being first duly sworn, deposes and says: That he is one of the plaintiffs in intervention, named in the above-named entitled action, and matter, that he has read the foregoing complaint and intervention, knows the contents thereof, and the same is true of his own knowledge, except

to matters therein stated on information and belief,
and as to those matters he believes it to be true.

F. M. WITHERS.

Subscribed and sworn to before me this 24 day
of June, 1927.

[Seal]

I, HENRY HARRIS,

Notary Public in and for the County of Los An-
geles, State of California.

—

In the District Court of the United States, for the
Southern District of California, Northern Divi-
sion.

No. B-121-M.—EQUITY.

WILLIAM E. WHITE, as Trustee in Bankruptcy
of E. Y. FOLEY, INC., a Bankrupt, and
also as Trustee in Bankruptcy of E. Y.
FOLEY, a Bankrupt,

Plaintiff,

vs.

PACIFIC SOUTHWEST TRUST AND SAV-
INGS BANK, a Corporation, et al.,

Defendants,

and

F. H. WILSON, Plaintiff in Intervention.

COMPLAINT IN INTERVENTION OF F. H.
WILSON (SECOND).

Comes now F. H. Wilson, who as plaintiff in
Intervention, leave of Court being first had and

obtained, files this his complaint in intervention, and alleges:

1.

That A. G. Johns has succeeded plaintiff William E. White as Trustee in Bankruptcy as aforesaid, and is now the party in interest as plaintiff herein in such representative capacity.

2.

The defendants, Pacific Southwest Trust & Savings Bank, a corporation, hereinafter called the Pacific Bank, J. E. Lynes, both individually and as Trustee for A. Arena & Co., Andrews Bros., A. Cancelmo, Sweeney Lynes & Co., Galinsky Fruit Co., F. E. Nellis & Co., and Penn Macaroni Co., and A. G. Johns, as such Trustee, by the joining of their issues herein, severally claim and assert an interest, adverse to F. H. Wilson, said plaintiff in intervention, in the certain fund hereinafter called "Special Account A," and an adjudication of the rights of the plaintiff and several defendants above named, without regard to the interest of said F. H. Wilson in and to said "Special Account A" would necessarily deprive said F. H. Wilson of a definite interest therein and/or cause and provoke a multiplicity of suits by said F. H. Wilson against the several parties who may otherwise be adjudged to be entitled to said fund.

3.

That the said fund "Special Account A" was and is a fund created and deposited with the said Pacific Bank for the purpose of paying to said F. H.

Wilson, George Rice, A. Setrakian, Gentile & Marco, and other creditors, 25 per cent of the then indebtedness of E. Y. Foley to them the said F. H. Wilson and such other creditors, as more fully appears from the findings and judgment herein, which judgment was duly entered herein on February 16th, 1926, and which as to the character of said fund has not been modified.

4.

That the status of the plaintiff and the defendants herein named, and of the said F. H. Wilson, A. Setrakian, Geo. Rice, Gentile & Marco, and other creditors of the said E. Y. Foley and E. Y. Foley, Inc., with respect to their interest in the said "Special Account A," has been in litigation for three years and more last past and until the refusal of the Supreme Court of the United States to review the decree of the United States Circuit Court to which the judgment of this Court was referred upon appeal, the plaintiff in intervention could not, by reason of such controversy, determine what legal and/or equitable course to pursue in order to avoid a multiplicity of actions and/or protect his interests and/or claims upon and against said fund and/or the plaintiff and defendants.

5.

That the issues involved in this action, with relation to the said "Special Account A," cannot be properly and equitably determined without reference to and determination of the rights and interest of the said F. H. Wilson therein, and he is

therefore a necessary and/or proper party to this action.

6.

That on the date thereof, said A. Setrakian was the payee and owner of a certain check, No. 3783, dated Aug. 15th, 1923, for the sum of \$1,250.00 and was then also payee and owner of a certain check, No. 3550, dated Aug. 15th, 1923, for the sum of \$715.24, both drawn upon said fund, to wit: E. Y. Foley, Inc., "Special Account A," signed and countersigned by E. Y. Foley, Inc., by E. Y. Foley, and H. A. Lyddane, thereunto duly authorized, and as such owner became the equitable assignee of a portion of such fund, to wit: \$1,965.24, same being 25 per cent of the amount of the then indebtedness of said E. Y. Foley to said payee.

7.

That both of said Checks were presented to said Pacific Bank for payment in due course out of said fund, and the said bank wrongfully refused and/or withheld payment of both of said checks, and still withholds and/or refuses such payment and the said checks are yet wholly unpaid, and said bank retained and now still holds possession of said checks for the use of the owner thereof.

8.

That immediately prior to the filing of this complaint in intervention, said A. Setrakian transferred and assigned the said checks to said F. H. Wilson with the purpose and intent that and the

fact is that said F. H. Wilson thereby became and is now the owner and holder of said checks.

9.

That all the claims of the plaintiff and of the several defendants herein named were at all times herein mentioned and are now subordinate and subject to the right of the said F. H. Wilson and his assignors to have and recover said sum of \$1,965.24 from and of the money in such fund, of which the sum of \$57,988.41 or thereabout, is now and at all times herein mentioned was on deposit with and in said Pacific Bank.

WHEREFORE said F. H. Wilson, the plaintiff in intervention, prays that he may be permitted to prove his said checks and his claims as aforesaid, and that upon modification of the judgment herein he be duly awarded the amounts of the several checks, hereinbefore described, aggregating the sum of \$1,965.24 and

That such judgment when modified do order and direct that from the said "Special Account A" the said F. H. Wilson be paid the sum of \$1,965.24 on account of such checks, and

That the Court do make such other and further order herein as shall by it be deemed necessary to effect settlement of the claims of the said plaintiff in intervention.

F. H. WILSON,

Plaintiff in Intervention.

By LeROY G. SMITH.

LeROY G. SMITH,

Attorney for Plaintiff in Intervention.

State of California,
County of Tulare,—ss.

F. H. Wilson, being first duly sworn, deposes and says: That he is the plaintiff in intervention named in the above-entitled action, and matter, that he has read the foregoing complaint and knows the contents thereof and the same is true of his own knowledge, except to matters therein stated on information and belief, and as to those matters he believes it to be true.

H. F. WILSON.

Subscribed and sworn to before me this 6th day of June, 1927.

[Seal]

LeROY G. SMITH,
Notary Public.

[Endorsed]: Filed Aug. 6, 1927.

At a stated term, to wit; the May Term, A. D. 1927, of the District Court of the United States of America, within and for the Northern Division of the Southern District of California, held at the courtroom thereof, in the city of Los Angeles, on Saturday, the 6th day of August, in the year of our Lord one thousand nine hundred and twenty-seven. Present: The Honorable PAUL J. McCORMICK, District Judge.

[Title of Cause.]

MINUTES OF COURT—AUGUST 6, 1927—
ORDER GRANTING MOTIONS FOR
LEAVE TO FILE COMPLAINTS IN IN-
TERVENTION, ETC.

The motions of F. H. Wilson, M. D. Hopper and John G. Carew for leave to file complaints in intervention herein are and each is granted and said complaints in intervention are and each is ordered filed herein, and plaintiff, defendant Pacific Southwest Trust and Savings Bank, a corporation, and other interveners are hereby granted twenty (20) days from date of notice of this ruling within which to answer said complaints in intervethnion respectively.

This permission and order giving said petitioners the right to intervene herein is made conditionally that hereafter and at the final decision of this case the Court will impose costs so as to equitably apportion the financial burden of this suit among those who have been financially benefited by it, and it is solely upon such conditions that the interventions are allowed at this time.

Dated this 6th day of August, 1927.

[Title of Court and Cause.]

MEMORANDUM OF PLAINTIFF OPPOSING
PETITION OF WITHERS BROS. FOR
LEAVE TO INTERVENE.

To the Honorable PAUL J. McCORMICK, Judge
of the Above-entitled Court:

Plaintiff in the above-entitled case opposes the said petition for leave to intervene in this case, principally upon the ground that said petition sets forth no cause of action disclosing any right of intervention on the part of Withers Brothers.

In support of our contention we adopt point II in the memorandum of points and authorities heretofore filed herein by the defendant Pacific Southwest Trust and Savings Bank.

We desire further to call the Court's attention to the following facts: The note upon which said Withers Brothers now desire to intervene in this case, or a copy thereof, is on file in the Foley bankruptcy proceedings as a part of the bankruptcy claims filed by said Withers Brothers and allowed in said Foley bankrupt estate.

It is a part of the official records of this court and is, we believe, properly the subject of the examination by the Court in considering the present question.

It is an ordinary promissory note and does not specify that it is payable out of the "Special Account A," or any other special fund or account; upon the date of said note the "Special Account

A" had not come into existence. There is nothing in the note that refers to or connects it with the "Special Account A" or any other special or particular fund.

Petitioners now seek *solely* by oral proof to vary and change the terms of this written instrument. In other words, the offered petition in intervention states nothing but an attempt to vary the terms of a written instrument by oral proof in direct violation of the old and familiar rule, and in fact by allegations contradicted by the affidavit to the bankruptcy claim based upon said note.

It is indeed a significant fact that although Withers Brothers have since November, 1923, almost constantly been an active party to that litigation arising out of the Foley bankruptcy, which involved their said bankruptcy claim, this is the very first time that Withers Brothers have ever advanced any claim that their said note was to be paid out of the "Special Account A."

Where a party litigates a matter for almost four years before the Referee, before the District Court, before the Circuit Court of Appeals and before the United States Supreme Court without advancing a contention, which he for the first time after the expiration of four years now advances as vital to his rights, his own course of conduct shows that such a belated claim is wholly without merit and purely an afterthought.

We submit that the petition for leave to intervene should be denied.

THEODORE M. STUART,

Attorney for Plaintiff.

Fresno, California, September 6th, 1927.

[Endorsed]: Filed Sep. 8, 1927.

[Title of Court and Cause.]

MEMORANDUM OF RULING ON MOTION.

The motion of F. M. Withers and C. H. Withers, composing the copartnership of Withers Bros., for permission to intervene is denied.

The proposed intervention fails to show any right of movents to participate in the "Special Account A" involved in this suit. There are no facts alleged in the proffered intervention that are sufficient to constitute any equitable assignment or lien upon said special fund.

The status of movents is different than interveners Wilson and others who have been permitted to participate in said "Special Account A." Such interveners were either growers or assignees of growers or persons who had received checks and orders in writing drawn and expressly made payable from this "Special Account A." It was primarily for the purpose of liquidating grower claims that such fund was created.

No satisfactory reason has been shown for the movents' delay in seeking intervention and as no

facts are alleged that warrant any preference to them over general creditors they cannot be permitted at this time to intervene.

Dated November 9th, 1927.

PAUL J. McCORMICK,
United States District Judge.

[Endorsed]: Filed November 9th, 1927.

At a stated term, to wit, the November, A. D. 1927, Term of the District Court of the United States of America, within and for the Northern Division of the Southern District of California, held at the courtroom thereof, in the City of Los Angeles, on Saturday, the 3d day of December, in the year of our Lord one thousand nine hundred and twenty-seven. Present: The Honorable PAUL J. McCORMICK, District Judge.

[Title of Cause.]

MINUTES OF COURT—DECEMBER 3, 1927—
HEARING.

This cause coming on at this time for settlement of decree, Theodore M. Stuart, Esq., being present on behalf of the Trustee, A. G. Johns; Ward Chapman, Esq., appearing on behalf of Intervenor Lynes; Milton Dearing, Esq., and Leonard Slosson, Esq., appearing on behalf of defendant Pacific Southwest Trust & Savings Bank; and A. G. Johns, Trustee being present, personally,—

Theodore M. Stuart, Esq., on behalf of the Trustee, makes a statement to the Court, and presents to the Court the Report of Referee Clyde H. Thompson on the meeting of creditors held pursuant to order of November 10th, 1927, in the county courthouse at Fresno, California, on the twenty-ninth day of November, 1927, at 10 o'clock in the forenoon, and said Report is filed herein; and Theodore M. Stuart, Esq., having presented the proposed stipulation and the proposed agreement, and the proposed decree heretofore filed herein on November 10th, 1927, "the proposed stipulation, proposed agreement and proposed decree are submitted at this time, and no party appearing to object to the entry of the same, and I. Henry Harris, Esq., being present, and stating that he desired to appear herein and object to this proceeding, and to consideration of or entry of proposed decree herein";

Alexander G. Johns, Trustee herein, is called and sworn, and under examination by Theodore M. Stuart, Esq., testifies he was present at the recent meeting of the creditors in Fresno on November 29th, 1927, when the proposed settlement and agreement was under consideration, and that at that time no one objected to said proposed agreement and decree, and under questioning by Mr. Harris, and the Court, states that no one voted in disapproval at said meeting, on said date, November 29th, 1927; and

James E. Lynes is called, sworn, and testifies under questioning by Mr. Stuart and states that no

objection was made by anyone at said meeting of creditors, November 29th, 1927. Mr. Harris, Esq., admits that he was not present at said meeting.

The Court continues: "The Court does not recognize I. Henry Harris, Esq., as regularly appearing herein, or as having any right to appear herein on behalf of himself, or any party to this action, and it appearing to the Court that no creditor has objected to the entry of the proposed decree herein, or to the confirmation and approval of the proposed agreement and proposed stipulation herein filed on November 10th, 1927, and it appearing that all creditors of the consolidated bankrupt estate of E. Y. Foley and E. Y. Foley, Inc., have approved of said proposed stipulation, proposed agreement and proposed decree, the Court thereupon signed and ordered entered herein the proposed stipulation and decree herein."

"In the District Court of the United States, in and for the Southern District of California, Northern Division.

No. B.-121—M.—EQUITY.

A. G. JOHNS (Substituted in the Place and Stead of WILLIAM E. WHITE), as Trustee in Bankruptcy of E. Y. FOLEY, a Bankrupt, and also as Trustee in Bankruptcy of E. Y. FOLEY, Inc., a Bankrupt,

Plaintiff,

vs.

PACIFIC-SOUTHWEST TRUST & SAVINGS BANK, a Corporation (Now LOS ANGELES-

FIRST NATIONAL TRUST & SAVINGS BANK, a National Banking Association), J. E. LYNES, Individually and as Trustee for A. ARENA & CO., ANDREWS BROS., A. CANCELMO, SWEENEY LYNES & CO., GALINSKY FRUIT CO., F. E. NELLIS & CO. and PENN MACARONI CO.; ARTHUR BAINBRIDGE TARPEY as Executor of the Last Will and Testament of M. F. Tarpey, Deceased, and C. D. PRUNER,

Defendants,

F. H. WILSON, M. D. HOPPER and JOHN G. CAREW,

Intervenors.

STIPULATION.

IT IS HEREBY STIPULATED that the above-entitled court may dispose of the above-entitled action and the interventions that have been allowed therein, in view of the mandate of the Circuit Court of Appeals for the Ninth Circuit, by the entry of a decree in the form attached to this stipulation and hereby referred to and made a part hereof.

IT IS FURTHER STIPULATED, inasmuch as the defendant Pacific-Southwest Trust & Savings Bank, a corporation, was consolidated on September 1, 1927, with the First National Bank of Los Angeles, a national banking association, under the name and style of Los Angeles-First National Trust & Savings Bank, a national banking association, that said Los Angeles-First National Trust & Savings

Bank, a national banking association, be substituted as defendant in the above-entitled action in the place and stead of Pacific-Southwest Trust & Savings Bank, a corporation.

Dated: November 9, 1927.

THEODORE M. STUART,
Attorney for Plaintiff.

FARRAND & SLOSSON,
GEO. E. FARRAND,
LEONARD B. SLOSSON,
MILTON M. DEARING,

Attorneys for Defendant Los Angeles-First National Trust & Savings Bank, a National Banking Association (Formerly Pacific-Southwest Trust & Savings Bank, a Corporation).

WARD CHAPMAN,
Attorney for Defendant J. E. Lynes, Individually and as Trustee for the Parties for Whom He has Appeared.

MAX THELEN,
HARRIS & HAYHURST,
Attorneys for Defendant Arthur Bainbridge Tarpey, as Executor of the Last Will and Testament of M. F. Tarpey, Deceased.

HARRIS & HAYHURST,
Attorney for Defendant C. D. Pruner.
Le ROY G. SMITH,
Attorney for Intervenor F. H. Wilson.
SAMUEL F. HOLLINS,
Attorney for Intervenor M. D. Hopper.

W. C. TUPPER,
Attorney for Intervenor John G. Carew.

It is so ordered this 3d day of December, 1927.

PAUL J. McCORMICK,
Judge.

In the District Court of the United States in and
for the Southern District of California, North-
ern Division.

No. B.-121-M.—IN EQUITY.

A. G. JOHNS (Substituted in the Place and Stead
of WILLIAM E. WHITE), as Trustee in
Bankruptcy of E. Y. FOLEY, a Bankrupt,
and also as Trustee in Bankruptcy of E. Y.
FOLEY, Inc., a Bankrupt,

Plaintiff,

vs.

PACIFIC-SOUTHWEST TRUST & SAVINGS
BANK, a Corporation (Now Los Angeles-
First National Trust & Savings Bank); J. E.
LYNES, Individually and as Trustee for A.
ARENA & CO., ANDREWS BROS., A.
CANCELMO, SWEENEY LYNES & CO.,
GALINSKY FRUIT CO.; F. E. NELLIS &
CO., and PENN MACARONI CO.; AR-
THUR BAINBRIDGE TARPEY, as Ex-
ecutor of the Last Will and Testament of
M. E. Tarpey, Deceased; and C. D. PRUNER.

Defendants.

F. H. WILSON, M. D. HOPPER and JOHN G.
CAREW,

Intervenors.

DECREE (PROPOSED).

This cause came on to be further heard at this term and the parties to this action having agreed upon the form of final judgment and decree to be entered pursuant to the mandate of the Circuit Court of Appeals for the Ninth Circuit, and having on this date, December 3d, 1927, appeared in open court and by their respective counsel, or by executed stipulation, and requested the entry of such judgment and decree, and the Court having considered such request and finding that the best interests of the consolidated bankrupt estate of E. Y. Foley and E. Y. Foley, Inc., will be served by the entry of this decree, now, by consent of all of the parties to this action and upon consideration of the agreement of said parties, **IT IS ORDERED, ADJUDGED AND DECREED** as follows, viz.:

1. That the decree of this court in this cause, made, rendered and entered on the 16th day of February, 1926, be and the same hereby is annulled, and set aside in its entirety.

2. That the amounts in dispute in this case, between the plaintiff and the defendant Los Angeles-First National Trust & Savings Bank (hereinafter called defendant bank) and the designations the accounts of the same bore on the records of the Bank are as follows:

E. Y. Foley Inc. Special Account A	\$ 57,988.41
E. Y. Foley Inc. 10% Account	21,759.81
E. Y. Foley Inc. Draft Account	44,293.60
E. Y. Foley Draft Account	3,391.94

to-wit, the total sum of \$127,433.76

3. That the said amounts of \$21,759.81, \$44,293.60 and \$3,391.94, respectively in said E. Y. Foley, Inc., 10% Account, E. Y. Foley, Inc., Draft Account and E. Y. Foley Draft Account, have been properly and lawfully offset and applied by the defendant bank upon indebtedness owing to it by E. Y. Foley, Inc., and that plaintiff is entitled to recover no part of said amounts.

4. That said sum of \$57,988.41 in said E. Y. Foley, Inc., Special Account A (hereinafter referred to as Special Account A), is the remainder of a special trust fund of \$200,000 advanced by certain contributors under the trust agreement of January 26, 1923, and under the creditors' contracts of February 19, 1923, and March 14, 1923, and said defendant bank is not entitled to offset said money or any part thereof.

5. That the names of said contributors to said Special Trust Fund of \$200,000 and the amounts contributed by each were as follows, to wit:

Name of Contributor.	Amount of Contribution.
Pacific-Southwest Trust & Savings Bank of Fresno, California (now defend- ant bank)	\$ 47,619.05

Sacramento-San Joaquin Bank (now United Bank & Trust Co.)	7,002.80
Union National Bank of Fresno, Califor- nia (now United Bank & Trust Co. of Fresno, Calif.)	4,201.68
Valley Bank of Fresno, California	2,801.12
First National Bank of Parlier, Califor- nia	11,204.48
Reedley National Bank of Reedley, Cali- fornia	700.28
First National Bank of Exeter, Califor- nia	1,400.56
First National Bank of Hanford, Cali- fornia	2,100.84
First National Bank of Del Rey, Califor- nia	560.23
Madery's Planing Mill of Fresno, Cali- fornia	5,602.24
California Pine Box Distr's of San Francisco	14,005.60
Parraffine Companys Inc. of San Fran- cisco	2,801.12
J. E. Lynes, Trustee	100,000.00
<hr/>	
TOTAL	\$200,000.00

6. That the parties for whom the said defendant J. E. Lynes acted as trustee in making his said contribution to said Special Trust Fund and the amounts advanced by them respectively to make up said contribution, are as follows, to wit:

Amount of contribu-
tion to the Lynes
\$100,000.00.

Name.	Address.	
A. Arena & Co.	249 E. B. Rivers Bldg., L. A.....	\$ 20,000.00
Bob Milligan	927 N. 4th St., St. Louis, Mo.....	7,326.00
Andrews Bros.	1712 W. Jefferson St., Detroit....	5,000.00
S. G. Palmer & Co.	228 N. 6th St., Minneapolis.....	8,000.00
A. Cancelmo	113 Dock St., Philadelphia.....	3,266.67
Hyman & Lieberman	127 Dock St., Philadelphia.....	3,266.67
Sweeney, Lynes & Co.	50 Clinton St., Boston.....	13,183.33
G. Rini Sons Co.	756 Broadway, Cleveland.....	3,400.00
G. Fava & Co.	13 E. Pratt St., Baltimore.....	3,333.32
Galinsky Fruit Co.	1015 Howard St., Omaha.....	8,110.00
Steinhardt & Kelly	273 Washington St., N. Y.....	10,000.00
F. E. Nellis & Co.	111 W. So. Water St., Chicago..	5,114.01
Penn Macaroni Co.	2010 Penn Ave., Pittsburg.....	10,000.00
TOTAL.....		\$100,000.00

7. That the said parties for whom said defendant J. E. Lynes acted as trustee in making said contribution to said fund are respectively indebted to the consolidated bankrupt estate of E. Y. Foley and E. Y. Foley, Inc., on account of business transacted in 1923, as follows:

A. Arena & Co. in the sum of.....	\$ 1,695.77
Bob Milligan in the sum of.....	800.49
Andrews Bros. in the sum of.....	6,436.93
S. G. Palmer & Co. in the sum of.....	5,507.45
A. Cancelmo in the sum of.....	3,179.76
Hyman & Lieberman in the sum of.....	1,690.35
Sweeney, Lynes & Co. in the sum of.....	9,257.88
G. Rini Sons Co. in the sum of.....	2,742.89
G. Fava & Co. in the sum of.....	3,873.99
Galinsky Fruit Co. in the sum of.....	237.07
Steinhardt & Kelly in the sum of.....	4,487.18
F. E. Nellis & Co. in the sum of.....	4,382.41
Penn Macaroni Co. in the sum of.....	8,345.55
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TOTAL.....	\$52,637.72

8. That the defendant bank shall deliver to the plaintiff the said sum of \$57,988.41, the amount of the said deposit in said Special Account A and such payment shall release and relieve said defendant bank from any and all liability to the defendants Lynes, Pruner and Tarpey and to the intervenors Carew, Hopper and Wilson, and to the contributors to said Special Account A for or by reason of or on account of said deposit in said Special Account A or any checks drawn thereon. And upon receipt of said money said plaintiff shall proceed to administer

and disburse the same in the manner following, to wit:

(a) \$6,300.00 shall be paid to the defendant C. D. Pruner and the same shall be in full payment, satisfaction and discharge of the check of said C. D. Pruner, dated August 28, 1923, drawn by E. Y. Foley, Inc., upon said Special Account A, and of the bankruptcy claim of said C. D. Pruner against said consolidated bankrupt estate in so far as the same is based upon said check or the portion of his claim for which said check was given, to the full face amount of said check.

(b) \$1,201.45 shall be paid to the defendant Arthur Bainbridge Tarpey as executor of the last will and testament of M. F. Tarpey, deceased, and the same shall be in full payment, satisfaction and discharge of the check of said M. F. Tarpey dated August 15, 1923, drawn by E. Y. Foley, Inc., upon said Special Account A and of the bankruptcy claim of said M. F. Tarpey against said consolidated bankrupt estate in so far as the same is based upon said check or the portion of his claim for which said check was given, to the full face amount of said check.

(c) \$7,923.46 shall be paid to the intervenor F. H. Wilson and the same shall be in full payment, satisfaction and discharge of the checks mentioned and described in the two complaints in intervention of said intervenor and of any and all bankruptcy claims in said consolidated bankrupt estate based thereon or upon the indebtedness for which said

checks were issued, to the full face amount of said checks.

(d) \$3,194.46 shall be paid to the intervenor M. D. Hopper and the same shall be in full payment, satisfaction and discharge of the checks mentioned and described in the complaint in intervention of said intervenor and of any and all bankruptcy claims in said consolidated bankrupt estate based thereon or upon the indebtedness for which said checks were issued, to the full face amount of said checks.

(e) \$2,810.30 shall be paid to the intervenor John G. Carew and the same shall be in full payment, satisfaction and discharge of the checks mentioned and described in the complaint in intervention of said intervenor and of any and all bankruptcy claims in said consolidated bankrupt estate based thereon or upon the indebtedness for which said checks were issued, to the full face amount of said checks.

(f) The balance of said sum of \$57,988.41 after making the payments provided for in said clauses (a), (b), (c), (d) and (e) of this decree shall be paid to the contributors of said fund named in Paragraph 5 of this decree other than Sacramento-San Joaquin Bank and Union National Bank of Fresno (both now United Bank & Trust Company) in proportion to the amounts of their contributions as listed in said paragraph, that is to say, said contributors shall receive respectively a portion thereof equal to the proportion that the contribution of the contributor bears to the total amount of the

contributions of said contributions after deducting therefrom the contributions of said Sacramento-San Joaquin Bank and said Union National Bank of Fresno (both now United Bank & Trust Company); said Sacramento-San Joaquin Bank and said Union National Bank of Fresno (both now United Bank & Trust Company) are excluded from the distribution for the reason that said United Bank & Trust Company has heretofore been paid the full amount of said contributions of said Sacramento-San Joaquin Bank and said Union National Bank of Fresno from other assets of said bankrupts.

9. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the said contributors to said \$200,000 trust fund mentioned in Paragraph 5 of this decree other than said Sacramento-San Joaquin Bank and the said Union National Bank of Fresno (both now United Bank & Trust Company) have and are entitled to a prior and preferred lien and claim for the amounts of their contributions respectively, as against the unsecured claims of creditors of the bankrupt estate of E. Y. Foley and E. Y. Foley, Inc., upon all of the assets of the consolidated bankrupt estate of E. Y. Foley, Inc., without preference or priority as between said contributors themselves upon their claims as contributors to said fund, and that plaintiff shall, and is hereby ordered and directed to, pay from the funds of said consolidated bankrupt estate, subject to said lien as aforesaid, to each of said contributors mentioned in Paragraph 5 of this decree, other than said Sacramento-San Joaquin Bank and said Union National Bank of

Fresno (both now United Bank and Trust Company) the whole amount of their respective contributions remaining unpaid after crediting thereon the amounts paid them respectively out of the funds from said Special Account A upon the distribution thereof under the terms of this decree; provided, however, that out of the amount to be paid to said defendant J. E. Lynes as trustee for the parties named in Paragraph 6 of this decree, plaintiff shall take credit for and retain for the benefit of said consolidated bankrupt estate the aggregate sum of \$26,318.86, being one-half of each of the respective amounts owing by said parties to the said bankrupt estate as determined by Paragraph 7 of this decree, and said defendant J. E. Lynes as trustee shall by reason of said deduction be entitled to credit in his accounting as trustee as against each of said contributors represented by him for one-half of the indebtedness of such party to said estate as determined by this decree; that the remaining one-half of the respective amounts owing by said parties mentioned in said Paragraph 7 of this decree to said consolidated bankrupt estate shall be paid by deducting the same from the allowed amounts of the respective bankruptcy claims filed in said bankruptcy proceeding by the said parties owing said indebtedness, and the referee in bankruptcy in said bankruptcy proceedings and plaintiff as trustee of said consolidated bankrupt estate are ordered and directed to make said deductions. Any contributor for whom said defendant J. E. Lynes acted as trustee and any contributor to said \$200,000 trust fund

not now a party to this suit who accepts any benefit under or by reason of this decree shall be deemed to have assented to each and all of the terms of this decree.

10. That the amount paid to said J. E. Lynes as trustee under the terms of this decree for the amount of the contribution by him as trustee to said \$200,000 fund, subject to the expenses of said Lynes trust, belongs to the persons named in Paragraph 6 of this decree in proportion to the amounts contributed by them as specified in said paragraph, that is to say each is entitled to the proportion thereof that the amount contributed by him bears to the total amount of all of the contributions specified in said paragraph, after the payment of said expenses.

11. That each payment made by plaintiff as herein ordered to a contributor to said Special Account A shall fully satisfy and discharge the bankruptcy claim of such contributor in said consolidated bankrupt estate to the extent that the said bankruptcy claim involves or is based upon said contribution.

12. It is further ORDERED, ADJUDGED AND DECREED that upon compliance by the defendant bank with the provisions of this decree requiring the delivery by it of said sum of \$57,988.41 in said Special Account A to plaintiff, said defendant bank shall be entitled to file and have allowed in said bankruptcy proceedings such enlarged, amended, modified and additional proofs of its claims as may be proper and/or necessary to estab-

lish the full and true indebtedness of the bankrupts, or either thereof, to said defendant bank as affected by this decree.

13. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the parties represented by the defendant J. E. Lynes as trustee shall be entitled to file and have allowed in said bankruptcy proceedings such amended, modified and additional proofs of their claims against said E. Y. Foley and E. Y. Foley, Inc., as may be proper and/or necessary to establish the full and true indebtedness of the bankrupts, or either thereof, to said parties, as affected by this decree.

14. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff take nothing from the defendant bank, other than the said sum of \$57,998.41 in said Special Account A, which shall be administered and disbursed by plaintiff as provided in this decree, and that the defendant bank have judgment against the plaintiff, A. G. Johns, as Trustee in Bankruptcy of the Consolidated Bankrupt Estates of E. Y. Foley and E. Y. Foley, Inc., for its costs in said United States Circuit Court of Appeals for the Ninth Circuit taxed at the sum of \$2,411.80, and that the defendant J. E. Lynes, individually and as Trustee for the parties for whom he has appeared herein, have judgment against the plaintiff, A. G. Johns, as Trustee in Bankruptcy of the consolidated bankrupt estates of E. Y. Foley and E. Y. Foley, Inc., for his costs in said United States Circuit Court of Appeals for the Ninth Circuit, taxed at the sum of

Four Hundred Forty-eight and 67/100 Dollars, and that said defendant bank and said defendant Lynes, respectively, have execution for the amounts of said costs for which they are awarded judgment as aforesaid, and that each party to this action shall pay his own costs incurred in this court.

Dated: December 3d, 1927.

PAUL J. McCORMICK,
United States District Judge.

Decree entered and recorded Dec. 3d, 1927.

R. S. ZIMMERMAN,
Clerk.

By Louis J. Somers,
Deputy.

[Endorsed]: Filed Nov. 10, 1927.

[Title of Court and Cause.]

PETITION FOR APPEAL.

To the Honorable PAUL J. McCORMICK, District Judge:

F. M. Withers and C. H. Withers, composing the copartnership of Withers Bros., feeling aggrieved by the order rendered and entered in the above-entitled cause on the 9th day of November, 1927, do hereby appeal from said order to the Circuit Court of Appeals for the Ninth District, for the reasons set forth in the assignment of errors filed herewith, and they pray that their appeal be allowed, and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents

upon which said order was based, duly authenticated, be sent to the said United States Circuit Court of Appeals for the Ninth Circuit under the rules in such cases made and provided.

And your petitioners further pray that the proper order relating to the required security to be required of them be made.

Dated: Los Angeles, California, December 2d, 1927.

I. HENRY HARRIS,
Attorney for Petitioners and Appellants.

[Endorsed]: Filed Dec. 3, 1927.

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

On motion of I. Henry Harris, solicitor and counsel for petitioners and appellants:

IT IS HEREBY ORDERED that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the order heretofore made and filed herein denying the right of petitioners and appellants to intervene in the above-entitled cause, be and the same is hereby allowed, and that a certified transcript of the record, testimony, exhibits, stipulations, and all proceedings, be forthwith transmitted to said Circuit Court of Appeals for the Ninth Circuit.

Dated: December 3d, 1927.

PAUL J. McCORMICK,
Judge.

[Endorsed]: Filed Dec. 3, 1927.

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Now comes F. M. Withers and C. H. Withers, composing the copartnership of Withers Bros., and makes and files this assignment of errors :

FIRST.

That the learned District Court of the United States erred in deciding that the proffered intervention fails to show any right of moveants to participate in "Special Account A" involved in the suit, in that the proffered intervention shows that a certain trust fund of \$200,000.00 was created by certain creditors of E. Y. Foley and placed under the control of the Board of Trustees of E. Y. Foley, Inc., the bankrupt, said moneys to be used in the payment of 25% of the claims of certain grower creditors and in paying pressing debts of E. Y. Foley, "the payment of which could not be deferred."

That the said petitioners were such "pressing creditors," they having obtained a judgment or judgments against E. Y. Foley which they were in a position to press against the assets of E. Y. Foley by the issuance of an execution and levy upon the property of said E. Y. Foley or by institution of bankruptcy proceedings.

That E. Y. Foley, Inc., and its Board of Trustees, the Trustees of the fund, on or about August 3d, 1923, entered into an agreement with the peti-

tioners wherein and whereby among other things, they agreed to pay to the petitioners the sum of \$21,500.00 out of "Special Account A" on September 3d, 1923, for the reason that the judgments herein referred to were pressing debts of E. Y. Foley the "payment of which could not be deferred."

That in consideration of the promise upon the part of the said trustees to pay said \$21,500.00 out of this "Special Account A" to the petitioners, they agreed to satisfy any judgment or judgments that they held against E. Y. Foley to the extent of \$21,500.00 and to accept stock for the balance due them under said judgments.

That the said E. Y. Foley, Inc., by its Board of Trustees, passed resolutions to pay said sum to petitioners and on August 3d, 1923, executed a promissory note for the sum of \$21,500.00 payable to petitioners on September 3d, 1923.

That although the petitioners were ready, willing and able to satisfy said judgment, the trustees of the funds did not deliver the stock provided for in the contract of August 3d, 1923, nor did they pay the note of \$21,500.00 on September 3d, 1923, or at any other time nor did they pay any part thereof.

That the petitioners as owners of said note became the equitable assignees of \$21,500.00 of said fund of \$200,000.00 as provided in that certain Trust Agreement executed between the creators of the Trust Fund and the trustees thereof, which agreement is referred to as Exhibit "B."

That the said Trust Fund of \$200,000.00 so created was deposited with the Pacific Southwest Bank for the purpose of paying to the petitioners and other creditors who came within the provisions of said fund and was designated as "Special Account A."

That the plaintiffs and the defendants in the action wherein intervention is sought have been in litigation for three years and more last *passed* and until the refusal of the Supreme Court of the United States to reverse the decision of the United States Circuit Court of Appeals to which court the judgment of this court was referred upon appeal, petitioners were unable to determine whether the fund was available for the petitioners, in that one of the issues to be determined in this suit was whether the Pacific Southwest Bank had the right to offset part of said trust fund, "Special Account A" on deposit with it against indebtedness of E. Y. Foley and indebtedness of E. Y. Foley, Inc., and therefore the status of the petitioners and other creditors entitled to payment under said trust fund and their interest in said fund could not be determined until the controversy between the trustees of the bankrupt and said bank was determined and decided.

Hence, and in order to avoid a multiplicity of suits, the petitioners awaited the decision in this action before filing the petition herein.

That other claimants to part of the fund adopted a like course as the petitioners, namely, awaited the final judgment in these proceedings before apply-

ing for leave to intervene and their petition was granted, which is a precedent for granting the petition herein.

SECOND.

That the learned District Court erred in deciding that the status of the petitioners is different from the intervenor Wilson, because said Wilson and others herein permitted to intervene are growers or assignees of growers, in that the fund was not created only for growers, but was also created to pay pressing debts of E. Y. Foley "the payment of which could not be deferred."

THIRD.

The learned District Court erred in holding that the fund was created primarily for the purpose of liquidating growers' claims, in that the fund was created not only to pay growers' claims, but pressing debts of E. Y. Foley, "the payment of which could not be deferred."

FOURTH.

The learned District Court erred in holding that these petitioners would receive a preference over other general creditors if the petition were granted, and that therefore they cannot be permitted to intervene, in that the granting of the petition could not result in the preference because the Trust Fund is not an asset of the estate. It was created for the benefit of petitioners and if not so used will be returned to the creators of the fund.

WHEREFORE, appellants and petitioners pray that said order be reversed and said District Court of *Appeals* for the Southern District of California, *Southern* Division, be ordered to enter a decree reversing the order in said cause.

Dated: Los Angeles, California, December 2d, 1927.

I. HENRY HARRIS,
Attorney for Appellants and Petitioners.

[Endorsed]: Filed Dec. 3, 1927.

[Title of Court and Cause.]

AMENDED ASSIGNMENT OF ERRORS.

Now comes F. M. Withers and C. H. Withers, composing the copartnership of Withers Bros., and makes and files this assignment of errors:

FIRST.

That the learned District Court of the United States erred in deciding that the proffered intervention fails to show any right of movants to participate in "Special Account A" involved in the suit, in that the proffered intervention shows that a certain trust fund of \$200,000.00 was created by certain creditors of E. Y. Foley and placed under the control of the Board of Trustees of E. Y. Foley, Inc., the bankrupt, said moneys to be used in the payment of 25% of the claims of certain grower creditors and in paying pressing debts of E. Y. Foley, "the payment of which could not be deferred."

That the said petitioners were such "pressing creditors," they having obtained a judgment or judgments against E. Y. Foley which they were in a position to press against the assets of E. Y. Foley by the issuance of an execution and levy upon the property of said E. Y. Foley or by institution of bankruptcy proceedings.

That E. Y. Foley, Inc., and its Board of Trustees, the Trustees of the fund, on or about August 3d, 1923, entered into an agreement with the petitioners wherein and whereby, among other things, they agreed to pay to the petitioners the sum of \$21,500.00 out of "Special Account A" on September 3d, 1923, for the reason that the judgments herein referred to were pressing debts of E. Y. Foley the "payment of which could not be deferred."

That in consideration of the promise upon the part of the said trustees to pay said \$21,500.00 out of this "Special Account A" to the petitioners, they agreed to satisfy any judgment or judgments that they held against E. Y. Foley to the extent of \$21,500.00 and to accept stock for the balance due them under said judgments.

That the said E. Y. Foley, Inc., by its Board of Trustees, passed resolutions to pay said sum to petitioners and on August 3d, 1923, executed a promissory note for the sum of \$21,500.00 payable to petitioners on September 3d, 1923.

That although the petitioners were ready, willing and able to satisfy said judgment, the trustees of the funds did not deliver the stock provided for

in the contract of August 3d, 1923, nor did they pay the note of \$21,500.00 on September 3d, 1923, or at any other time, nor did they pay any part thereof.

That the petitioners as owners of said note became the equitable assignees of \$21,500.00 of said fund of \$200,000.00 as provided in that certain Trust Agreement executed between the creators of the Trust Fund and the trustees thereof, which agreement is referred to as Exhibit "B."

That the said Trust Fund of \$200,000.00, so created, was deposited with the Pacific Southwest Bank for the purpose of paying to the petitioners and other creditors who came within the provisions of said fund and was designated as "Special Account A."

That the plaintiffs and the defendants in the action wherein intervention is sought have been in litigation for three years and more last *passed* and until the refusal of the Supreme Court of the United States Circuit Court of Appeals to which court the judgment of this court was referred upon appeal, petitioners were unable to determine whether the fund was available for the petitioners, in that one of the issues to be determined in this suit was whether the Pacific Southwest Bank had the right to offset part of said trust fund, "Special Account A," on deposit with it against indebtedness of E. Y. Foley and indebtedness of E. Y. Foley, Inc., and therefore the status of the petitioners and other creditors entitled to payment under said trust fund and their interest in said fund could not be determined until the controversy be-

tween the trustees of the bankrupt and said bank was determined and decided.

Hence, and in order to avoid a multiplicity of suits, the petitioners awaited the decision in this action before filing the petition herein.

That other claimants to part of the fund adopted a like course as the petitioners, namely, awaited the final judgment in these proceedings before applying for leave to intervene and their petition was granted, which is a precedent for granting the petition herein.

SECOND.

That the learned District Court erred in deciding that the status of the petitioners is different from the intervenor Wilson, because said Wilson and others herein permitted to intervene are growers or assignees of growers who have received checks and orders in writing drawn and expressly made payable from the "Special Account A." not created only for growers, but was also created to pay pressing debts of E. Y. Foley "the payment of which could not be deferred."

THIRD.

The learned District Court erred in holding that the fund was created primarily for the purpose of liquidating growers' claims, but pressing debts of E. Y. Foley, "the payment of which could not be deferred."

FOURTH.

The learned District Court erred in holding that these petitioners would receive a preference over other general creditors if the petition were

granted, and that therefore they cannot be permitted to intervene, in that the granting of the petition could not result in the preference because the Trust Fund is not an asset of the estate. It was created for the benefit of petitioners and if not so used will be returned to the creators of the fund.

WHEREFORE, appellants and petitioners pray that said order be reversed and said District Court of *Appeals* for the Southern District of California, *Southern* Division, be ordered to enter a decree reversing the order in said cause.

Dated, at Los Angeles, California, December 9th, 1927.

I. HENRY HARRIS,
Attorney for Appellants and Petitioners.

[Endorsed]: Filed Dec. 13, 1927.

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of Said Court:

Sir: Please prepare certified record on appeal to the Circuit Court of Appeals, Ninth District, and include therein copies of the following papers: Mandate or Judgment of Circuit Court of Appeals in B.-121-M.

This praecipe.

Assignment of error.

Amended assignment of error.

Order allowing appeal.

Petition for appeal.

Complaint in intervention.

Notice of motion for hearing of motion for intervention and for leave to intervene.

Opposition papers filed by Pacific Southwest Bank.

Opposition papers filed by Trustee.

Any and all papers filed in opposition to the granting of the motion memorandum of ruling on motion per Hon. Paul J. McCormick, Judge.

Complaint in intervention of F. H. Wilson.

Order granting motion of F. H. Wilson.

Dated: Los Angeles, December 21, 1927.

I. HENRY HARRIS,

Atty. for Petitioners and Appellants.

[Endorsed]: Filed Dec. 21, 1927.

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO TRANSCRIPT OF RECORD.

I, R. S. Zimmerman, Clerk of the District Court of the United States for the Southern District of California, do hereby certify the foregoing to consist of the original citation, and a full, true and correct copy of that certain portion of the Mandate of the United States Circuit Court of Appeals for the Ninth Circuit, of which it purports to be a copy, filed in my office April 28th, 1927, and of a full, true and correct copy of the original complaint in intervention of F. H. Wilson, filed in my

office May 6th, 1927; notice of motion of F. H. Wilson, for leave to intervene (omitting therefrom affidavit of service), filed in my office June 7th, 1927; notice of motion of F. M. Withers for leave to intervene, and complaint in intervention of F. M. Withers et al., etc., filed in my office June 29th, 1927; complaint in intervention of F. H. Wilson (Second), filed in my office August 6th, 1927; minute order of August 6th, 1927; memorandum of plaintiff opposing petition of Withers Bros. for leave to intervene, filed in my office September 8th, 1927; memorandum on ruling on motion, filed in my office November 9th, 1927; minute order of December 3d, 1927, including therein copy of stipulation and proposed decree and proposed agreement filed November 10th, 1927; petition for appeal, order allowing appeal, and assignment of errors, all filed in my office December 3d, 1927; amended assignment of errors, filed in my office December 13th, 1927, and praecipe for transcript on appeal filed in my office December 21st, 1927.

I DO FURTHER CERTIFY that the fees of the Clerk for preparing and certifying the foregoing record on appeal amount to \$20.90, and that said amount has been paid by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the District Court of the United States of America, in and for the Southern District of California, Northern Division, this 27th day of January, in the year of our Lord one thousand nine hundred and twenty-

eight, and of our Independence the one hundred and fifty-second.

[Seal]

R. S. ZIMMERMAN,

Clerk of the District Court of the United States
of America, in and for the Southern District
of California.

[Endorsed]: No. 5374. United States Circuit Court of Appeals for the Ninth Circuit. F. M. Withers and C. H. Withers, Copartners Doing Business Under the Firm Name and Style of Withers Bros., Appellants, vs. A. H. Johns, as Trustee in Bankruptcy of E. Y. Foley, Inc., a Bankrupt and also as Trustee in Bankruptcy of E. Y. Foley, a Bankrupt, and Pacific Southwest Trust & Savings Bank, a Corporation, et al., Appellees. Transcript of Record. Upon Appeal from the United States District Court for the Southern District of California, Southern Division. Filed January 30, 1928.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

